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IN THE
COURT OF APPEALS OF INDIANA

DANIEL SNELL,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0708-CR-700
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Tanya Walton-Pratt, Judge
Cause No. 49G01-0608-MR-151692

May 15, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Sr. Judge

Daniel Snell appeals his convictions for two counts of murder.[1] Snell raises three issues, which we restate as:

I. Whether the trial court abused its discretion by excluding Snell's alibi witness;

II. Whether the trial court abused its discretion when it rejected Snell's proposed alibi instruction; and

III. Whether Snell's consecutive sentences are inappropriate in light of the nature of the offenses and the character of the offender.

We affirm.

The relevant facts follow. On the night of August 2, 2006, Snell, Charles Richardson, and two women were hanging out in the driveway of a residence on North Webster in Indianapolis, Indiana. Antoine Beech and Eric Gray stopped by the residence to use some cocaine they had bought. Beech and Gray saw that Snell had a handgun in his waistband and thought he was acting "weird" and "belligerent." Transcript at 76, 159. After the two women went inside the residence, Allan Westmoreland and Latasha Pettis approached in a vehicle. Richardson hailed Westmoreland, and Westmoreland parked the car. At some point, Gray heard Richardson say, "there go the neighborhood snitch." Id. at 163.

Richardson and Beech talked to Westmoreland, and then Beech went to the rear of another vehicle to use his cocaine. As Beech and Gray were using their cocaine, they

[1] Ind. Code § 35-42-1-1 (Supp. 2006) (subsequently amended by Pub. L. No. 1-2007, § 230 (eff. Mar. 30, 2007)).

saw Snell approach Westmoreland's vehicle by sneaking through some bushes. Snell then reached inside the vehicle and started shooting Westmoreland. Snell went to the vehicle's passenger side, dragged Pettis out of the vehicle as she screamed, and shot her. Snell then went back to the driver's side of the vehicle, reloaded his gun, and shot Westmoreland again.

The first officer on the scene discovered that Westmoreland was dead and that Pettis was critically wounded. Pettis told the officer that a young black man with a bald head wearing blue shorts shot her. Less than three hours later, Snell reported to the police that his 9 mm gun had been stolen.

Both Westmoreland and Pettis died from their gun shot wounds. Westmoreland had been shot nine times, and Pettis had been shot two times. All of the casings found at the scene were "9 mm Luger caliber cartridge casings," and the bullets were "9 mm." Id. at 403-404. All of the bullets and casings large enough for analysis were fired from the same gun. When officers attempted to arrest Snell a few days later, Snell identified himself as "Jonathan Snell," his brother, and fled on foot. Id. at 327. Snell was eventually apprehended by the officers.

The State charged Snell with two counts of murder. After the State rested at the jury trial, Snell attempted to call his girlfriend, Sarajevo Anderson, as an alibi witness. Noting that Snell had failed to file a notice of alibi, the trial court denied Snell's request to present Anderson as an alibi witness and noted that Snell had not demonstrated good cause for his failure to file a timely notice of alibi. Snell then testified at the trial that he

left the residence on North Webster before Westmoreland arrived and that he spent the night with Anderson. Snell tendered an instruction regarding alibi evidence as follows:

> You have heard evidence that at the time of the crime charged the defendant was at a different place so remote or distant (or that such circumstance existed) that he could not have committed the crime. The State must prove beyond a reasonable doubt the defendant's presence at the time and place of the crime.

Appellant's Appendix at 95. The trial court denied Snell's proposed instruction because it had denied Snell's motion to offer alibi testimony.

The jury found Snell guilty as charged. The trial court found Snell's minimal criminal history as a mitigator and sentenced him to fifty years in the Indiana Department of Correction for both murder convictions. Due to the "nature and the circumstances of the offense" and "the fact that there are multiple victims – two victims, two lives," the trial court ordered that the sentences be served consecutive to each other. Transcript at 603.

I.

The first issue is whether the trial court abused its discretion by excluding Snell's alibi witness. We review the trial court's ruling on the admission or exclusion of evidence for an abuse of discretion. Roche v. State, 690 N.E.2d 1115, 1134 (Ind. 1997), reh'g denied. We reverse only where the decision is clearly against the logic and effect of the facts and circumstances. Joyner v. State, 678 N.E.2d 386, 390 (Ind. 1997), reh'g denied.

Ind. Code § 35-36-4-1 provides that if a defendant "intends to offer in his defense evidence of alibi, the defendant shall, no later than . . . twenty (20) days prior to the

omnibus date if the defendant is charged with a felony[,] file with the court and serve upon the prosecuting attorney a written statement of his intention to offer such a defense." The notice of alibi "must include specific information concerning the exact place where the defendant claims to have been on the date stated in the indictment or information." Ind. Code § 35-36-4-1. If the defendant fails to timely file his notice of alibi defense and does not show good cause for this failure, then "the court shall exclude evidence offered by the defendant to establish an alibi." Ind. Code § 35-36-4-3(b). The determination of whether a defendant has established good cause is left to the discretion of the trial court. Seay v. State, 529 N.E.2d 106, 110 (Ind. 1988).

Here, after the State presented its evidence at trial, Snell attempted to call his girlfriend, Sarajevo Anderson, as an alibi witness. It is undisputed that Snell did not file a notice of alibi as required under Ind. Code § 35-36-4-1. Thus, Snell was required to show good cause for his failure to file a timely notice of alibi. The trial court concluded that Snell failed to show good cause. In particular, the trial court noted that Snell's failure to disclose the witness "because he didn't want to make his girlfriend jealous" was not good cause and was "bad faith." Transcript at 469-470.

Given Snell's failure to file a timely notice of alibi and failure to show good cause, we cannot say that the trial court abused its discretion by excluding Anderson's testimony. See, e.g., Seay, 529 N.E.2d at 110 ("Considering the fact that appellant had over five months to prepare for trial, yet waited until the State had concluded its presentation of the evidence to provide a notice of alibi, we find no abuse of the trial court's discretion.").

II.

The next issue is whether the trial court abused its discretion when it rejected Snell's proposed alibi instruction. "The purpose of an instruction is to inform the jury of the law applicable to the facts without misleading the jury and to enable it to comprehend the case clearly and arrive at a just, fair, and correct verdict." Overstreet v. State, 783 N.E.2d 1140, 1163 (Ind. 2003), cert. denied, 540 U.S. 1150, 124 S. Ct. 1145 (2004). Instruction of the jury is generally within the discretion of the trial court and is reviewed only for an abuse of that discretion. Id. at 1163-1164. A trial court erroneously refuses to give a tendered instruction, or part of a tendered instruction, if: (1) the instruction correctly sets out the law; (2) evidence supports the giving of the instruction; and (3) the substance of the tendered instruction is not covered by the other instructions given. Id. at 1164.

Snell tendered an instruction that provided:

> You have heard evidence that at the time of the crime charged the defendant was at a different place so remote or distant (or that such circumstance existed) that he could not have committed the crime. The State must prove beyond a reasonable doubt the defendant's presence at the time and place of the crime.

Appellant's Appendix at 95. The trial court denied Snell's proposed instruction because it had denied Snell's motion to offer alibi testimony.

On appeal, Snell argues that the trial court abused its discretion by rejecting the proposed alibi instruction because, even though Anderson's alibi testimony was excluded, Snell gave alibi evidence when he testified that he was with Anderson at the time of the murders. The Indiana Supreme Court has held that "the exclusion of a

defendant's own testimony of alibi under the alibi statute, I.C. § 35-36-4-1, is an impermissible infringement upon the right of the accused to testify guaranteed by Article I, § 13 of the Indiana Constitution." Campbell v. State, 622 N.E.2d 495, 499 (Ind. 1993) (abrogated on other grounds by Richardson v. State, 717 N.E.2d 32, 49-50 (Ind. 1999)); see also Palmer v. State, 654 N.E.2d 844, 845 (Ind. Ct. App. 1995) (holding that "an accused who improperly files a notice of alibi may still offer his own alibi testimony under his constitutional right to testify in his own defense"). Thus, even though Anderson's testimony was excluded, Snell could testify in his own defense regarding his alibi.

Even if we assume that the trial court abused its discretion by rejecting Snell's proposed instruction, we conclude that any error was harmless. A defendant must demonstrate that his substantial rights have been prejudiced in order to obtain a reversal for the trial court's failure to instruct the jury. Cliver v. State, 666 N.E.2d 59, 67 (Ind. 1996), reh'g denied; Ind. Trial Rule 61. The jury was instructed that the State was required to prove each element of murder beyond a reasonable doubt, that Snell was presumed to be innocent, that Snell could not be convicted on suspicion or speculation, and that the jury had the duty to determine the value to give a witness's testimony. Appellant's Appendix at 79-88. Snell testified that he left the residence on North Webster before Westmoreland arrived and that he spent the night with Anderson. If the jury had believed Snell, it could have returned a verdict in his favor based upon the instructions that were given. The trial court's failure to instruct the jury with Snell's proposed alibi instruction did not prejudice Snell's substantial rights. See, e.g., Merrill v.

State, 716 N.E.2d 902, 906 (Ind. 1999) (holding that the defendant's trial counsel was not ineffective for failing to tender an alibi instruction because the instruction was unlikely to change the outcome of the trial where the "jury heard his alibi defense and if it had believed him, could have returned a verdict in his favor" and the "jury also heard Merrill's alibi witness deny being in the restroom with him").

III.

The final issue is whether Snell's consecutive sentences are inappropriate in light of the nature of the offenses and the character of the offender. Ind. Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

The trial court sentenced Snell to fifty years for each murder conviction, which is less than the advisory sentence of fifty-five years. Ind. Code § 35-50-2-3. In doing so, the trial court recognized Snell's minimal criminal history. However, in recognition of the multiple victims and the nature and circumstances of the case, the trial court ordered that the sentences be served consecutively. Snell now argues that the consecutive sentences were inappropriate in light of his character.

Our review of the character of the offender reveals that Snell has a minor criminal history. He received a medical discharge from the Navy. The trial court took Snell's

minimal criminal history into consideration when imposing sentences less than the advisory sentences.

Our review of the nature of the offense reveals that Snell shot and killed Westmoreland and Pettis. In imposing the consecutive sentences, the trial court emphasized "the fact that this was a cold-blooded execution-style murder, there was a total disregard for two lives, not just one life, but two lives, the fact that Mr. Westmoreland was shot nine times, that . . . [Snell] reloaded the clip on [his] handgun, shot and killed Latasha Pettis as she begged for her life, and after [he] had killed . . . Miss Pettis, [he] went back and continued to shoot Mr. Westmoreland." Transcript at 603.

Given the brutal nature of the offenses and the fact that two people were murdered, we cannot say that the consecutive sentences imposed by the trial court are inappropriate in light of the nature of the offense and the character of the offender. See, e.g., Major v. State, 873 N.E.2d 1120, 1130-1131 (Ind. Ct. App. 2007) (rejecting the defendant's argument that consecutive sentences were inappropriate and affirming his 175-year sentence for three counts of murder and one count of aggravated battery), trans. denied.

For the foregoing reasons, we affirm Snell's convictions and sentences for two counts of murder.

Affirmed.

NAJAM, J. and DARDEN, J. concur